

Service Date: May 24, 1995

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER OF MONTANA RAIL)	TRANSPORTATION DIVISION
LINK, INC., Missoula, Montana, Notice of)	
Proposed Trackage Removal, C.B.&Q.)	DOCKET NO. T-94.110.RR
Track No. 29, Block 116, Billings Townsite,)		
Billings, Montana.)	ORDER NO.6365

PROPOSED ORDER

APPEARANCES

FOR THE APPLICANT:

Evonne Smith Wells, Attorney at Law, P.O. Box 9410, Missoula, Montana 59807

FOR THE PROTESTANT:

James A. Patten, West, Patten, Bekkedahl and Green, P.L.L.C., Attorneys at Law, 301 North 27th Street, Suite 100, Old Chamber Building, Billings, Montana 59101

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, Wayne Budt, Transportation Division Administrator, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

BEFORE:

NANCY MCCAFFREE, Chair, Hearings Examiner

INTRODUCTION

1. On December 23, 1994, Montana Rail Link, Inc. (MRL), Missoula, Montana, filed with the Public Service Commission (PSC) a request for exemption from the application of Section 69-14-813, MCA, for the removal of approximately 210 feet of track, including a switch, on a spur

identified as C.B.&Q. Track No. 29, located at Block 116, Billings Townsite, Billings, Montana. The PSC has treated MRL's request as a "Notice of Proposed Trackage Removal," in accordance with the above-reference statute (Sec. 69-14-813, MCA).

2. MRL's request was noticed to the public on February 8, 1995. One protest and one letter (comment) were received. A public hearing on the matter was held May 27, 1995 in Billings. Evidence was then taken and the parties agreed that a Proposed Order would issue, arguments being reserved for the procedure on exceptions, if such then appear necessary.

FINDINGS OF FACT

3. All introductory statements which can properly be considered findings of fact and which should be considered as such to preserve the integrity of this Order are incorporated herein as findings of fact.

4. MRL presented three witnesses, Mark Simonson, MRL engineering department, Tom Benson, MRL area roadmaster, and John Maxon, MRL area trainmaster and Billings agent. MRL exhibits include an Industrial Track Agreement, with an attached map of the affected trackage, switch, spur, and area, and numerous pictures of locations along the spur. Ronald Sannes (Sannes), owner of much of the spur and a business located on the spur, testified as a protestant. From the testimony and exhibits the PSC finds as follows.

5. In July, 1988, Burlington Northern Railroad Company (BN) and Sannes entered an agreement whereby Sannes acquired most of the spur in issue, except for the switch and the first 120 feet of track. Sannes's portion of the spur is roughly 1300 feet in length, spanning three or four commercial city blocks, through what appears to now be an alleyway of varying widths and conditions.

6. In October, 1987 (prior to the BN and Sannes agreement), MRL acquired property and track use rights from BN. For purposes of this proceeding MRL is the railroad operating the area's main line and has become the assignee of BN's agreement with Sannes. At least one part of Sannes's spur passes over MRL property for about 210 feet (this includes the switch and the 120 feet

of track retained by BN in its agreement with Sannes). This is the portion of the spur which MRL seeks to remove.

7. MRL, citing reasons of safety (derailments), removed the switch serving the spur in 1992. MRL agrees that it did not seek PSC approval for removing the switch serving the spur at the time it was removed. MRL agrees that it provided no public notice (or notice to Sannes) of removal of the switch at the time it was removed.

8. It is a certainty that the spur has not been used in the last five years (a period important in the governing statute), the parties seem to agree that the spur has not been used since Sannes acquired it (about seven years ago), and there is some indication that the spur might not have been used for several years prior to that. The last use referenced on the record is Sannes having received freight on the spur at times during the 1970's. Presently, points on the spur (together comprising most of the spur) are covered with dirt, grass, and weeds, paved over, fenced over, parked on, and used as a storage location.

9. Sannes testified that he purchased the spur for the purpose of having it available when needed. He did not testify as to any present need for rail services on the spur. No other shipper or business (which could be served by the spur) testified. Neither Sannes nor any other potential shipper has requested service from MRL on the spur.

10. The agreement between BN (now MRL) and Sannes received the bulk of the parties' attention at hearing. For reasons expressed in the conclusions of law, most facts (other than those identified above) related to the agreement need not be determined here.

11. As an additional factual point, Daniel W. McGee, a state representative and registered surveyor, filed a letter expressing a concern that survey points are sometimes linked to railroad improvements and when those improvements are removed the reference points may be lost. McGee requests that the PSC require MRL to file information regarding the physical features prior to removal, so that the reference points may be perpetuated on the ground.

CONCLUSIONS OF LAW

12. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this order are incorporated herein as conclusions of law.

13. The PSC has jurisdiction over certain activities of railroads pursuant to Title 69, Chapter 14, MCA. Among these, the PSC has jurisdiction over the removal of a spur track pursuant to Section 69-14-813, MCA. The application of MRL is proper in form and was properly noticed, protested, and heard in accordance with applicable law and rule, including Title 2, Chapter 4, MCA (Montana Administrative Procedures Act).

14. In relevant part, Section 69-14-813, MCA, generally provides that in the event that a spur track formerly used by the public has not been used for a period of five years the spur may be removed after 90 days notice to the PSC, unless the PSC notifies the railroad that removal must be preceded by a determination on whether the public convenience and necessity requires the continued maintenance of the spur. The PSC so notified MRL.

15. Insofar as the PSC is concerned (has jurisdiction) the merits of MRL's request turn on what "public convenience and necessity" demands in regard to the spur. The PSC will generally grant a railroad's request to remove a spur (or like facility) when the public convenience and necessity does not require that it be maintained.

16. "Public convenience and necessity" is a term of art in rail transportation (and motor carriage). It may have slightly different meanings in specific contexts (motor carrier, rail agency, rail facilities), but it universally includes consideration of the public's need for service. In context of removal of a spur, this would essentially mean that if the public needs service on the spur, the spur must continue to be maintained.

17. There is no evidence that the public presently needs service on the spur. Generally, neither speculation on need, a desire that the facility be available if there should be a need, nor the mere possibility of some future need qualify to establish that there is a need. Need must be present and real and, in some contexts, even immediate and urgent. Sannes, the only shipper testifying, did not establish a qualifying need.

18. The PSC concludes that public convenience and necessity does not require the continued maintenance of the spur. The PSC concludes that, for all matters that are within the PSC's authority, the requested removal of the identified portion of the spur can be granted.

19. The BN (now MRL) and Sannes contract is not within PSC jurisdiction. Any grant herein of authority to MRL is not an indication (one way or the other) as to what MRL is bound to do in regard to the spur by agreement (contract).

20. In regard to Daniel McGee's comments on survey points, such is also not an issue that is within PSC jurisdiction. MRL may use its discretion on the matter.

ORDER

1. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this Order are incorporated herein as an order.

2. All pending objections, motions, and arguments not specifically having been ruled on in this Order (if any) shall be deemed denied, to the extent that such denial is consistent with this Order.

3. The Montana Public Service Commission, being fully apprised of all premises, HEREBY ORDERS that MRL's request to remove the switch and track is GRANTED (for all purposes properly within PSC jurisdiction).

4. This Order in no way determines the contract rights between, or among, BN, MRL, and Sannes. Additionally, this Order in no way determines whether BN, in its agreement with Sannes first proceeded in accordance with the law governing spurs.

5. From the record it appears that there is probable cause that MRL has violated Section 69-14-813, MCA, by its 1992 removal of the switch serving the spur without first obtaining authority from the PSC. For this MRL may be subject to fine or other penalty. At the discretion of the hearing examiner, the PSC may be presented with this probable cause finding for a determination on whether a complaint should be issued to MRL.

Done and Dated this 24th day of May, 1995.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Chair and
Hearing Examiner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the PSC prior to Final Order. See Section 2-4-621, MCA. Exceptions and briefs must be filed within 20 days of the service date of this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. See ARM 38.2.4803 and 38.2.4804.

No transcript of the hearing on this matter has been ordered by any party or the Commission. If exceptions are filed as to any finding of fact, the party making the exception shall provide a complete transcript and reference the portions of the transcript which pertain to the exception.